U.S. Department of Justice

United States Attorney
Northern District of Ohio

United States Court House
801 West Superior Avenue, Suite 400
Cleveland, Ohio 44113-1852

April 17, 2009

Leonard Green, Clerk of the Court
Office of the Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

RE: *Demjanjuk v. Holder,* No. 09-3416
Citation of Supplemental Authorities

Dear Mr. Green:

Pursuant to Fed. R. App. P. 28(j), Respondent advises the Court of new authority relevant to the pending jurisdictional issue:

- In Re Demjanjuk (Board of Immigration Appeals, April 15, 2009

The BIA has denied Petitioner's Motion to Reopen his removal proceedings. Noting that CAT deferral does not fall within the statutory exception to the deadline for motions to reopen, the BIA held that Petitioner was ineligible for CAT relief because he failed to demonstrate that he would be tortured if removed to Germany.

This decision renders the instant matter moot. Petitioner's eleventh-hour motion for a stay was premised on the argument that this Court had jurisdiction-despite the lack of a statutory basis-because removal of Petitioner was imminent and, if removed, BIA regulations deemed his motion to reopen withdrawn, "obviat[ing] any need for" judicial review. (Petitioner's Motion for Stay at 3-4.) That fanciful basis no longer exists. Petitioner now has a final order that can be reviewed by this Court.

Without conceding any jurisdictional arguments, Respondent agrees that it will not remove Petitioner for five days following this Court's dismissal order up to and including April 30, 2009, affording Petitioner ample time to appeal the BIA's ruling and litigate a stay motion. Respondent is currently gathering for expeditious submission the materials referenced in the Court's Briefing Order.

Respondent also advises the Court that it will soon file a formal motion to dismiss this matter. Petitioner has engaged in numerous delaying tactics, and allowing this mooted matter to continue would only afford him further opportunities for delay. For example, a judge in Germany

issued an arrest order on March 10, 2009 (made public the next day), yet Petitioner did not move the BIA to reopen his case until April 2, 2009. The Immigration Judge who first granted petitioner a stay lifted it effective April 8, 2009, when he realized he lacked jurisdiction, yet Petitioner waited until hours before his scheduled removal before commencing the mad scramble to obtain a stay from this Court on April 14, 2009. Petitioner now has a legitimate avenue for appeal, and the instant matter should be terminated.

Respectfully submitted,

WILLIAM J. EDWARDS
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Northern District of Ohio

ROBERT G. THOMSON
Deputy Director
Office of Special Investigations

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2009, the foregoing Respondent's Letter to Court Pursuant to FRAP 28(J) was filed electronically. Notice of this filing will be sent to all parties by operation of the Court s electronic filing system. Parties may access this filing through the Court's system.

s/Michelle L. Heyer
Michelle L. Heyer
Assistant U.S. Attorney

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A008 237 417 - Cleveland, OH Date: APR 15 2009

In re: JOHN DEMJANJUK a.k.a. John Iwan Demjanjuk

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: John H. Broadley, Esquire

ON BEHALF OF DHS: Eli M. Rosenbaum
Director
Office of Special Investigations
Criminal Division, USDOJ

APPLICATION: Reopening

The Board entered the final administrative order in this case on December 21, 2006, when we dismissed the respondent's appeal from an Immigration Judge's denial of his application for deferral of removal to the Ukraine under the Convention Against Torture. On January 30, 2008, the United States Court of Appeals for the Sixth Circuit affirmed, and the Supreme Court denied the respondent's petition for *certiorari* on May 19, 2008. On April 7, 2009, the respondent filed a motion to reopen seeking an opportunity to apply or reapply for protection under the Convention Against Torture. The Department of Homeland Security opposes the motion. The motion will be denied.

The respondent seeks application of the exception to the general time restrictions on motions to reopen that applies to motions seeking consideration of applications for asylum or withholding of removal based on changed conditions in a country of removal. 8 C.F.R. § 1003.2(c)(3)(ii). *See generally Haddad v. Gonzales*, 437 F.3d 515 (6th Cir. 2006). The respondent, who has been found removable for having participated in Nazi persecution, is ineligible for either asylum or section 241(b)(3) withholding of removal pursuant to sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(2)(A)(i), 1231(b)(3)(B)(i).[1] Further, he is ineligible for withholding of removal under the Convention Against Torture pursuant to 8 C.F.R. §§ 1208.16(d)(2), 1208.17(a). The respondent may only seek deferral of removal under the Convention, a form of protection from removal that is not referenced in the 8 C.F.R. § 1003.2(c)(3)(ii) exception.

[1] The statutory exception based on changed circumstances in the country of removal does not cover applications for protection under the Convention Against Torture. *See* section 240(c)(7)(C)(ii) of the Act.

In any event, even if a motion seeking an opportunity to apply for deferral of removal under the Convention Against Torture may be considered under the exception, we find that the respondent has not persuasively demonstrated that it applies here. Alternatively, we find that the motion fails on the merits.

The respondent's prior application sought deferral of removal solely with respect to Ukraine. He now seeks an opportunity to apply for deferral of his removal to Germany, one of the alternate countries designated for his removal. No objective evidence was provided with the motion to support the respondent's claim that he will arrested, detained, and prosecuted for war crimes upon his arrival in Germany. However, the Government does not contest that an arrest order has been issued by a German judge based on "suspicion of assistance in the murder of at least 29,000 Jews at the Sobibor extermination center during World War II" and that Germany has consented to the respondent's admission to Germany. *See* "Government's Opposition to Respondent's Motions to Reopen and for an Emergency Stay" at p. 4.

It is not clear why the respondent believes that Germany would not have sought to prosecute him if he was returned at the time he last applied for deferral of removal. However, to the extent the recent arrest order can be construed as a "change" in circumstances arising in Germany, it does not, in itself, satisfy the materiality element required for motions generally as well as for motions seeking the application of the §1003.2(c)(3)(ii) exception.

The definition of "torture" at 8 C.F.R. § 1208.18(a)(3) expressly provides that "[t]orture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions" including "judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty. . . ." The respondent's argument that Germany's intent in seeking to charge him is to inflict pain and suffering on him that, due to his age and physical condition, would now amount to torture within the meaning of 8 C.F.R. § 1208.18(a) is entirely speculative. The facts determined in the denaturalization proceedings in the federal courts, and established in these administrative removal proceedings by collateral estoppel, do not lend themselves to a conclusion that any pain or suffering the respondent might suffer if he is detained in Germany would be incident to anything other than legitimate law enforcement objectives (BIA Decision dated December 21, 2006, at pp. 2-3, 12-16). *See United States v. Demjanjuk*, No. 1:99CV1193, 2002 WL 544622, 544623 (N.D. Ohio Feb. 21, 2002) (unpublished decisions), *aff'd*, 367 F.3d 623 (6th Cir. 2004), *cert. denied*, 543 U.S. 970 (2004).

The respondent has provided evidence regarding his medical condition, but has not provided any objective evidence establishing that Germany's criminal justice system does not consider a defendant's physical capacity to stand trial,[2] that he will likely be detained pending trial, or that, if he is detained, appropriate medical care will not be provided or he will otherwise be subjected to conditions that reach the "extreme form of cruel and inhumane treatment" necessary to constitute

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[2] Although not a determinative matter, as the burden of proving that reopening is warranted rests with the respondent, we note that the Government's opposition to the motion is supported by a study reporting that the German courts have suspended or dismissed the proceedings against accused Nazi war criminals in cases where they were determined to be medically incompetent to stand trial.

torture. 8 C.F.R. § 1208.18(a)(2). To warrant the reopening of a final order, the respondent must provide evidence showing a likelihood that he would be able to prevail on his application for deferral of removal. The burden of proof is on the respondent "to establish that it is more likely than not that he . . . would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2); *see also* 8 C.F.R. §§ 1208.16(c)(3) and 1208.17(a). This motion is not supported by evidence showing a likelihood that, if his proceedings were reopened, he would be able to meet his burden of proving that it is more likely than not that he will face torture in Germany or that any law enforcement actions would "defeat the object and purpose of the Convention Against Torture." 8 C.F.R. § 1208.18(a)(3). Therefore, separate from the untimeliness issue, the respondent has failed to satisfy the heavy burden required for reopening. *See generally Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (a party who files a motion to reopen bears a "heavy burden" of proving that "if proceedings before the Immigration Judge were reopened, with all of the attendant delays, the new evidence would likely change the result in the case").

We have considered the respondent's arguments advanced in his "Motion for Leave to File Reply" to the Government's opposition to the motion. However, the facts supporting the respondent's removal order were determined by the United States District Court for the Northern District of Ohio and affirmed by the United States Court of Appeals for the Sixth Circuit. *See United States v. Demjanjuk, supra.* We do not find the respondent's argument related to the earlier proceedings in Israel relevant to our ruling on the present motion. The sole issue properly before us is whether reopening is warranted to permit the respondent to pursue a claim for deferral of removal to Germany under the Convention Against Torture. *See United States v. Demjanjuk, supra.* Further, we lack jurisdiction in these removal proceedings to address the respondent's argument that Germany will run afoul of the rule against double jeopardy if it prosecutes the respondent in criminal proceedings except to the extent that this argument relates to the issue of deferral of removal; and, we do not find that it provides any meaningful support for the respondent's Convention Against Torture claim. Finally, we have no jurisdiction to review the DHS physician's medical determination regarding the respondent's physical fitness to travel. Accordingly, the motion will be denied. The respondent's motion for a stay pending consideration of this motion was separately denied by order dated March 10, 2009.

ORDER: The respondent's motion is denied.

FOR THE BOARD